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No. 95-696

In The

Supreme Court of the United States

October Term, 1995

GARY ZUSPANN,

Petitioner,

versus

JESSE BROWN, Secretary of Veterans Affairs, WALLACE HOPKINS, DR. EDWARD YOUNG, and DR. SUSAN MATHER,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES E. WREN
LAURA E. STILL
C. ALFRED MACKENZIE*
HALEY & DAVIS, P.C.
510 North Valley Mills Drive, Suite 600
Waco, Texas 76710
(817) 776-3336
(817) 776-6823 FAX

ROBERT L. MCHANEY, JR.
6613 Sanger Avenue
Waco, Texas 76710
(817) 776-3611
(817) 776-9217 FAX

Attorneys for the Petitioner
* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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THE QUESTION PRESENTED FOR REVIEW

Whether the Veterans' Judicial Review Act of 1988 precludes a veteran from challenging, in federal district court, policies and procedures of the Department of Veterans Affairs that violate the Rehabilitation Act of 1973 and the Due Process Clause of the Fifth Amendment to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

Gary Zuspann, Petitioner, files this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was delivered on August 11, 1995, and is reported as *Zuspann v. Brown*, 60 F.3d 1156 (5th Cir. 1995). (App. 1-11). The opinion of the United States District Court for the Western District of Texas, Waco Division, was delivered on September 13, 1994, and is reported as *Zuspann v. Brown*, 864 F.Supp. 17 (W.D. Tex. 1994). (App. 12-20).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 11, 1995. (App. 21-22). No petition for rehearing was filed in the court of appeals by any party. The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The Due Process Clause of the Fifth Amendment to the United States Constitution:

> . . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; . . . .

U.S. CONST. amend V. (App. 23).

(b) The Rehabilitation Act of 1973:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794(a). (App. 23-26).

(c) The Judicial Review Preclusion Provision:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a). (App. 26-27).

STATEMENT OF THE CASE

A. Summary of Material Facts

Zuspann's claims arise out of the Department's discrimination against him in the provision of medical care solely on the basis of a disability in violation of the Rehabilitation Act of 1973 and the Due Process Clause of the Fifth Amendment to the United States Constitution. Zuspann was an otherwise qualified veteran eligible for medical care by virtue of his service in the United States Navy.

1. History of Zuspann's Illness

During Operation Desert Storm Zuspann was a mess cook on board the U.S.S. New Orleans, which was anchored in the Persian Gulf. During the war Zuspann and other members of the crew were exposed to smoke and debris from burning oil wells. They also bathed in and drank from water that had been pumped from the Gulf, where large oil slicks were visible. In addition, exhaust from a diesel-fueled generator permeated the entire ship for approximately six months during a failure of the ship's main power supply. Zuspann's job as a mess cook required him to spend long periods of time below deck, where diesel exhaust and other fumes, including hydrogen sulfide gas and jet fuel vapors, were trapped as a result of a ventilation system failure.

Following Zuspann's tour of duty in the Persian Gulf, he and other naval personnel on board the U.S.S. New Orleans disembarked in the Philippines, where they were ordered to assist in the clean up of ash and debris from a recent volcanic eruption. Unlike the volunteers from other organizations assisting with the clean up, Zuspann and the other naval personnel were not provided with protective clothing, face masks, respirators, or gloves to protect them from the volcanic ash that contained dangerous quantities of silica dust. Zuspann was then flown from the Philippines back to the mainland of the United States.

Beginning on August 20, 1991, the day after he returned to Texas, Zuspann sought medical treatment for complaints of low back and neck pain, weight loss, headaches, chills, wheezing, shortness of breath, and coughing. After receiving his formal discharge from the United States Navy in September 1991, Zuspann took a job with a company that placed him in its management training

program. Within a few weeks, however, his health deteriorated such that he was unable to drive himself to work, often had to leave work because he was physically ill, and was taken to an emergency room on several occasions.

In January 1992 Zuspann collapsed and was taken to an emergency room in Fort Worth, Texas, where he was diagnosed as suffering from a severe asthma attack. When his severe respiratory condition persisted, Zuspann sought treatment from a clinic in Fort Worth that serves as a satellite facility of the Department of Veterans Affairs. The physician at the satellite clinic prescribed inhalers and steroids for Zuspann's respiratory condition. However, Zuspann suffered an allergic reaction to both types of treatment.

In June 1992, after repeatedly requesting that the Department evaluate and treat his medical condition, Zuspann was reactivated for a medical evaluation. On July 16, 1992, Zuspann was admitted to the Walter Reed Army Medical Center in Washington D.C., where he remained for extensive diagnostic evaluation until August 18, 1992. Upon the recommendation of officials at Walter Reed, Zuspann was then relieved from active duty and transferred to Houston, Texas, for additional testing and treatment in a Department hospital. From August 19, 1992, until October 7, 1992, Zuspann was hospitalized at the Department of Veterans Affairs Medical Center in Houston, one of three research centers designated by the Department to study the conditions and complaints of Persian Gulf veterans and staffed with physicians specializing in environmental illnesses, including chemical sensitivity.

While Zuspann was hospitalized in Houston, the Department retained Dr. Claudia Miller, a staff physician

employed by the University of Texas Health Science Center at San Antonio, as a consultant to examine Zuspann and evaluate his condition. Dr. Miller, a specialist in environmental and occupational medicine, determined that Zuspann's symptoms were consistent with a disease known as "chemical sensitivity." Dr. Miller recommended that Zuspann be tested in an environmental unit to identify the particular chemicals that triggered a reaction from Zuspann and to determine whether exposure to these chemicals could be eliminated.

Dr. Richard Hamill, the physician responsible for Zuspann's care at the Department hospital in Houston, likewise diagnosed Zuspann as having symptoms consistent with chemical sensitivity. Nevertheless, the Department discharged Zuspann from the Houston hospital and sent him home without treatment and without provisions for further medical care.

2. The Department's Refusal to Provide Treatment for Chemical Sensitivity

The Department admits that there are many Persian Gulf veterans who are ill and for whom no explanation can be found for their symptoms, that it cannot rule out chemical sensitivity as an explanation for the symptoms, and that it has no recognized medical alternative to treat these ailing Persian Gulf veterans. Dr. Susan Mather, a Department physician in the environmental medicine and public health division who was assigned by the Department to the expert scientific panel investigating the complaints of Persian Gulf veterans, reviewed Zuspann's medical history and the extensive diagnostic testing conducted by the Department physicians in Houston. Despite Dr. Miller's initial diagnosis that Zuspann is chemically sensitive, Dr. Hamill's discharge diagnosis

that Zuspann's symptoms are consistent with chemical sensitivity, and Dr. Mather's own concession that chemical sensitivity "appears to be descriptive of Mr. Zuspann's symptoms," Dr. Mather concluded that chemical sensitivity "cannot be considered a 'bona fide disease entity.' " The Department's subsequent refusal to provide medical care to Zuspann has been based solely on this official policy that chemical sensitivity is not a "bona fide" disease rather than a determination that no treatment is medically necessary to treat Zuspann's symptoms and condition. In essence, the Department has diagnosed Zuspann with chemical sensitivity and then refused to provide any treatment on the basis of that diagnosis.

That Zuspann's complaint involves discrimination rather than merely a medical determination or a disputed denial of benefits is best exemplified by the actions of Dr. Edward Young, the Chief of Staff at the Department hospital in Houston and head of the Department's medical referral center organized to investigate and treat Persian Gulf veterans with illnesses similar to Zuspann's. Dr. Young publicly criticized Persian Gulf veterans for seeking medical treatment of the symptoms and conditions associated with chemical sensitivity and accused these veterans of making "health complaints to get government compensation." When interviewed by a *Birmingham News* reporter on the subject of illnesses that affected Persian Gulf veterans, Dr. Young stated, "It really rankles me when people stand up and call it 'Persian Gulf Syndrome.' To honor this thing with some name is ridiculous." Furthermore, Dr. Young told Zuspann that neither he nor the Department of Veterans Affairs would provide treatment for Zuspann's condition.

3. Zuspann's Entitlement to Medical Care

The Department initially rated Zuspann with a 70% disability rating. After Zuspann filed his original complaint, however, the Board of Veterans' Appeals determined that Zuspann met the criteria for a 100% disability rating and increased his service connected disability rating to 100%. *See* Decision of the Board of Veterans' Appeals, Docket No. 93-12461 (March 2, 1994). Because Zuspann has a service connected disability rated at 50% or more, he is entitled to medical care, both hospital care and outpatient care, for *any disability* from which he suffers. 38 U.S.C. §§ 1710(a)(1)(D), 1712(a)(1)(B). Zuspann has repeatedly requested that the Department provide medical care for his symptoms and condition. But when Zuspann has sought care at the Department's regional hospital in Waco, Texas, he has been turned away without treatment. For example, in March 1993, when Zuspann had a severe reaction to talcum powder and requested emergency medical care from the Department hospital in Waco, he was told that he was "on his own." When the Department has refused to treat Zuspann, he has been forced to seek medical care at a private hospital. At Tri-City Hospital, Zuspann was diagnosed with and treated for chemical sensitivity by physicians specializing in environmental medicine. Even though Zuspann's condition has improved while receiving treatment in an environmental unit at Tri-City Hospital, the Department has persistently refused to provide treatment. Although the Secretary may contract with non-Department facilities to furnish medical services when Department facilities are not capable of furnishing the care or services required, the Department has refused to issue a Fee Basis Medical ID Card so that he could obtain his medical care from a physician specializing in the treatment of environmental

illnesses, including chemical sensitivity, or in a facility equipped with an environmental unit. *See* 38 U.S.C. § 1703(a)(2)(A). Finally, Zuspann requested, as a last resort, that the Department provide him with basic treatment for chemical sensitivity on an out-patient basis at his home, which had been adapted to be as chemical free as possible. *See* 38 U.S.C. § 1712. Again, the Department refused. As a result, Zuspann has incurred more than $400,000.00 in medical expenses for private health care.

4. Zuspann Is an Individual With a Disability

Zuspann is unable to care for himself, leave his home, work, or engage in any recreational activity. Because these impairments associated with chemical sensitivity have substantially limited one or more of Zuspann's major life activities, he is an "individual with a disability" as defined by the Rehabilitation Act of 1973. *See* 29 U.S.C. § 706(8)(B). Solely on the basis of chemical sensitivity, which the Department concedes is descriptive of Zuspann's condition but which it refuses to recognize as a disease, the Department has excluded Zuspann from participation in, denied him the benefits of, and subjected him to discrimination under its program for providing medical care to otherwise qualified veterans. *See* 29 U.S.C. § 794(a).

B. Trial Court Jurisdiction and Proceedings

In February 1994 Zuspann sued Jesse Brown, the Secretary of Veterans Affairs, Wallace Hopkins, Director of the Department of Veterans Affairs Medical Center in Waco, Dr. Edward Young, Chief of Staff at the Department of Veterans Affairs Medical Center in Houston, and Dr. Susan Mather, a Department physician in the office of

the Under Secretary for Health. Zuspann alleged in his original complaint that the Secretary and the individual Defendants discriminated against him in the provision of medical care, to which he is entitled as a United States veteran, in violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Due Process Clause of the Fifth Amendment to the United States Constitution. U.S. CONST. amend. V. Zuspann also brought a *Bivens* action against the individual Defendants for deprivation of Zuspann's constitutionally protected property interest in the medical benefits to which he is entitled as an otherwise qualified veteran. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Zuspann sought declaratory relief, compensatory and punitive damages, and attorneys' fees. The Secretary and the individual Defendants filed motions to dismiss Zuspann's claims. The district court dismissed the case for lack of subject matter jurisdiction and entered a final judgment against Zuspann. *See Zuspann v. Brown*, 864 F.Supp. 17 (W.D. Tex. 1994). The basis for federal jurisdiction in the United States District Court for the Western District of Texas was 28 U.S.C. § 1331.

C. Decision on Appeal

Zuspann appealed the judgment of the district court to the United States Court of Appeals for the Fifth Circuit. Appellate jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291. The court of appeals affirmed the judgment of the district court on August 11, 1995, characterizing Zuspann's action against the Secretary and the individual Defendants as merely a complaint

"about a denial of benefits."[1] By ignoring Zuspann's challenge to the Department's policy of discrimination against veterans solely on the basis of a disability, the court of appeals concluded that the district court lacked jurisdiction over Zuspann's claims against the Secretary and that Zuspann failed to state a claim upon which relief could be granted against the individual Defendants.[2] *See*

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[1] Both the district court and the court of appeals erroneously concluded that Zuspann's complaint "fails to specifically point to a policy or regulation that prevents [him] from obtaining medical care." *See Zuspann*, 60 F.3d at 1159; *Zuspann*, 864 F.Supp. at 21. Zuspann's complaint and his responses to the motions to dismiss all specifically point to the Department's official refusal to recognize chemical sensitivity as the policy that prevents him from obtaining medical care.

The "gravamen" of Zuspann's complaint is not that the Department denied any specifically requested medical treatment. *See Zuspann*, 60 F.3d at 1159. Instead, Zuspann's recitation of his physical condition as described by Department physicians, the various treatments recommended by the physicians employed or retained by the Department, and the alternative courses of action available to the Department merely exemplify the Department's incongruous official position that chemical sensitivity simply is not a bona fide disease. And though Zuspann's original complaint may request some specific relief beyond the scope of the district court's jurisdiction, such a request for relief should not divest the district court of jurisdiction to hear Zuspann's principal complaint – that the Department's policies and procedures, by which veterans whom it has classified as chemically sensitive are discriminated against in the provision of medical care, violate the Rehabilitation Act and the Due Process Clause of the Fifth Amendment.

[2] The Respondents' legal analysis regarding subject matter jurisdiction has likewise been based upon their mischaracterization of Zuspann's claims. Even the unartfully worded statement in Zuspann's response to the Secretary's motion to dismiss, cited by the Respondents and relied upon by both lower courts, implicitly points to the Department's policy of discrimination:

Zuspann v. Brown, 60 F.3d 1156, 1159-61 (5th Cir. 1995). Because the court of appeals erred in affirming the district court's dismissal of Zuspann's claims under the Rehabilitation Act and the Due Process Clause of the Fifth Amendment, this Court should grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and review the dismissal of claims properly brought by Zuspann in the United States District Court for the Western District of Texas, Waco Division.

REASONS FOR GRANTING THE WRIT

A. The Courts of Appeals Have Failed to Apply the Standard Adopted by This Court in *Traynor v. Turnage* to the Veterans' Judicial Review Act of 1988

1. The Presumption in Favor of Judicial Review

In *Traynor v. Turnage*, 485 U.S. 535, 545, 108 S.Ct. 1372, 99 L.Ed.2d 618, 630 (1988), the Supreme Court held that 38 U.S.C. § 211(a) did not preclude judicial review of a Veterans' Administration regulation which allegedly violated section 504 of the Rehabilitation Act of 1973. As stated by the Court in *Traynor*, the strong presumption in

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> Zuspann does not challenge V.A. regulations pertaining to service connection or to service connected disability ratings. Zuspann does not seek a systematic change in agency policies or regulations; rather, Zuspann challenges the Department's refusal to officially acknowledge chemical sensitivity and provide him with the medical care that he is entitled to receive, in violation of the Rehabilitation Act.

See Zuspann, 60 F.3d at 1159 n.18. In summary, Zuspann's complaint challenges the lawfulness and constitutionality of a Department policy or procedure that does not involve a regulation promulgated pursuant to any statute dealing with veterans' benefits.

favor of judicial review of an administrative action may be overcome only upon a showing of "clear and convincing evidence" of a contrary legislative intent. *Traynor*, 485 U.S. at 542. Therefore, the courts should look to such evidence as "specific language or specific legislative history that is a reliable indicator of congressional intent," or a specific congressional intent to preclude judicial review that is "fairly discernible in the detail of the legislative scheme." *Id.*

2. History of the Judicial Review Preclusion Provision

Throughout the history of the judicial review preclusion provision, the language of section 211(a) has been anything but unambiguous. In *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), the Supreme Court concluded that section 211(a) did not explicitly bar constitutional claims directed at veterans' benefits legislation. Section 211(a), as amended in 1970, precluded judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans." *See* 38 U.S.C. § 211(a) (amended 1988). (App. 30). The Court determined that the prohibition of judicial review was aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. *Johnson*, 415 U.S. at 367. According to the Court, the two primary purposes behind section 211(a) were: (1) to insure that veterans' benefits claims would not burden the courts and the Veterans' Administration with expensive and time consuming litigation, and (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with

veterans' benefits decisions would be adequately and uniformly made. *Id.* at 370. The Court in *Johnson* held that neither amended section 211(a) nor the legislative history of the 1970 amendment suggested that Congress intended to preclude judicial review of constitutional challenges to veterans' benefits legislation. *Id.* at 373.

As in *Johnson*, the Supreme Court in *Traynor* determined that section 211(a) insulated from judicial review decisions of law and fact "under any law administered by the Veterans' Administration," that is, "decisions made in interpreting or applying a particular provision of that statute to a particular set of facts." *Traynor*, 485 U.S. at 543 (citing *Johnson*, 415 U.S. at 367). The Court recognized that the Veterans' Administration has no special expertise in assessing the validity of its regulations construing veterans' benefits statutes under a statute of general application such as the Rehabilitation Act. *Id.* at 544. Further, the Court held that permitting a judicial challenge to a Veterans' Administration regulation which violates the Rehabilitation Act would not undermine the two primary purposes of section 211(a) any more than did the result in *Johnson*. *Id.*

In *Marozsan v. United States*, 852 F.2d 1469 (7th Cir. 1988) (en banc), the Seventh Circuit extended the reasoning of *Johnson* and *Traynor*, holding that the courts "must construe section 211(a) to allow substantial constitutional challenges [footnote omitted] to the veterans' benefits statutes and regulations, *as well as to the procedures established by the V.A. to administer them.*" *Id.* at 1472 (emphasis added); *see also Arnolds v. Veterans' Administration*, 507 F.Supp. 128 (N.D. Ill. 1981) (section 211(a) does not bar judicial review of constitutional challenges of regulations, procedures, or policies of the Secretary). In *Marozsan* a veteran challenged the constitutionality of procedures

utilized by the Veterans' Administration in denying him benefits. The Seventh Circuit noted that Marozsan did not seek judicial review of the accuracy of the benefits decisions made by the Administrator in his particular claim; rather, Marozsan challenged the constitutionality of Veterans' Administration procedure. The court stated:

> Marozsan properly asks us to review the methods – not the decision – of the Administrator. He claims that a federal executive agency has acted outside its constitutional authority by violating his right to due process. Marozsan's action therefore is not essentially a suit to recover veterans' benefits; "it is a suit to enforce lawful conduct on the part of the [administrator]." *Starnes v. Schweiker*, 715 F.2d 134, 141 (4th Cir. 1983) (holding that section 1395ff of the Social Security Act did not bar claims that the Secretary's reimbursement ceilings violated the Constitution). When the issue is "not whether the Administrator's decision granting or denying benefits in a particular case was right or wrong, but rather whether the Administrator has acted consistently with his grant of authority or had exceeded his authority and acted in violation of veterans' rights guaranteed by the fifth amendment," § 211(a) does not apply. *Arnolds v. Veterans' Administration*, 507 F. Supp. 128, 130-131 (N.D. Ill. 1981).

Marozsan, 852 F.2d at 1472.

Because section 211(a) was facially ambiguous, the Seventh Circuit noted that it was possible to interpret the statute in two ways: (1) broadly – as barring review of all decisions of the Administrator or (2) narrowly – as barring only those decisions of law or fact under veterans' benefits laws. *Id.* at 1472-73. Relying on the Supreme Court's opinion in *Traynor*, the court held that the narrow

interpretation of section 211(a) is "not only viable, it is required in order to avoid the serious constitutional questions necessarily raised by a broader construction of the statute." *Id.* at 1473.

3. The Veterans' Judicial Review Act of 1988

The Secretary and the individual Defendants contend that Congress intended to further restrict judicial review of "decisions concerning veterans' benefits" when it enacted the Veterans' Judicial Review Act of 1988 ("VJRA"), 38 U.S.C. § 7101, *et seq.*, which established an adjudicatory procedure for the review of any "decision by the Secretary under a law that affects the provision of benefits."

During the 100th Congress, the Senate Committee on Veterans' Affairs published Senate Report No. 100-418 to express its view that "VA claimants in all parts of the country should have uniform access to the judicial system rather than having to litigate before various district courts and appellate court panels the questions of whether and to what extent section 211(a) operates as a bar in a particular case." S. REP. NO. 418, 100th Cong., 2d Sess. 51 (1988). The Senate Committee was concerned that the Supreme Court's opinion in *Traynor* did not go far enough to clarify the jurisdictional issue with regard to challenges to a Veterans' Administration regulation under a law described in section 211. *Id.* at 52-53. Accordingly, Senate Bill 11, which the Senate passed on July 11, 1988, precluded judicial review only of a disability rating schedule issued or adopted by the Administrator. *See* S. 11, 100th Cong., 2d Sess. (1988), 134 CONG. REC. S9181, S9208 (daily ed. July 11, 1988).

Meanwhile, a separate bill was under consideration in the House. *See* H.R. 5288, 100th Cong., 2d Sess. (1988),

134 CONG. REC. H9253 (daily ed. Oct. 3, 1988). The report accompanying House Bill 5288 favored a broader interpretation of the judicial review preclusion provision, while Senate Bill 11 maintained the narrow interpretation. *See* H.R. REP. NO. 963, 100th Cong., 2d Sess. 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5809 (stating that the "effect of [the House Amendment] is to broaden the scope of section 211, so that if, for example, the Administrator were to make a decision that a law precluding the provision of benefits to certain veterans did not conflict with another law prohibiting discrimination against disabled persons, that decision 'affects' the provision of benefits to such persons and could only be reviewed in accordance with the provisions of section 223 or chapter 71").

The Secretary and the individual Defendants would have the Court's inquiry into the legislative history of the VJRA begin and end with House Report 963. But as the 100th Congress drew to a close, Senator Cranston and Representative Montgomery worked out a compromise between Senate Bill 11 and House Bill 5288. The compromise agreement submitted by the chairmen of the House and Senate committees on Veterans' Affairs in lieu of a conference report did not adopt the broad view proposed by House Bill 5288 as addressed in House Report 963. The Explanatory Statement on Compromise Agreement explains the provisions of the compromise agreement which led to the enactment of the VJRA of 1988:

> Compromise agreement: The compromise agreement (section 101) contains the House provision *with amendments (a) to clarify that the requirement to make decisions and the general preclusion of judicial review apply only to a decision by the Administrator under a law that affects the provision of benefits by the Administrator;* and (b) to

> delete the amendment relating to the Attorney General's opinion.

134 CONG. REC. S16650, S16651 (daily ed. Oct. 18, 1988), *reprinted in* 1988 U.S.C.C.A.N. 5834, 5834 (emphasis added). (App. 28-30).

Although the Explanatory Statement does not explain exactly what is intended by the words, "under a law that affects the provision of benefits by the Administrator," the final version of the Bill proposed by the compromise agreement was narrower than that under the House version. *See id.* As evidenced by the comments of Senator Cranston when the compromise agreement was introduced on the floor of the Senate, the Court of Veterans Appeals would have exclusive jurisdiction of cases involving decisions by the Administrator under a law that affects the provision of benefits by the Veterans' Administration. But because the new court's jurisdiction was limited by the scope of section 211(a), "the establishment of the new court would not affect an individual's ability to bring any other type of challenge – *such as a challenge to the lawfulness or constitutionality of VA action or procedure not involving a VA rule or regulation* or a challenge under the Freedom of Information Act or the Privacy Act or an equal opportunity challenge, to name a few – through any judicial forum or process currently available to an aggrieved party." 134 CONG. REC. S16632, S16647 (daily ed. Oct. 18, 1988) (emphasis added).

Both houses passed the Veterans' Judicial Review Act, as proposed by the compromise agreement, and section 211(a) was amended to read as follows:

> (a)(1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to

> veterans or the dependents or survivors of veterans. Subject to paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105, 4105-06 (1988) (amended 1991). (App. 31-32).

Passage of the VJRA only after a compromise was reached to resolve the differences between Senate Bill 11 and House Bill 5288 indicates that Congress rejected the broad interpretation suggested by House Report 963 in favor of the narrow interpretation described by the Explanatory Statement on Compromise Agreement. Congress's adoption of a narrow construction of section 211(a) is consistent with the Supreme Court's holding in *Traynor* that the judicial review preclusion provision applies only to "decisions made in interpreting or applying a particular provision of [the veterans' benefits laws] to a particular set of facts." *Traynor*, 485 U.S. at 543; *Marozsan*, 852 F.2d at 1473, n.11. Because neither the text nor the legislative history of section 211(a) provides the "clear and convincing evidence" of congressional intent necessary to overcome the presumption in favor of judicial review of administrative action, section 211(a), and its successor, section 511(a),[3] should not be construed to preclude judicial review of Department policies and procedures that violate the Rehabilitation Act and the Due

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[3] 38 U.S.C. § 211(a) was recodified in 1991 as 38 U.S.C. § 511. *See* Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 2(a), 105 Stat. 378, 388-89 (1991).

Process Clause of the Fifth Amendment. *See Traynor*, 485 U.S. at 542.

4. The Courts of Appeals for the Second and Eighth Circuits Treat the VJRA as a Presumption Against Judicial Review

The Secretary and the individual Defendants rely upon *Hicks v. Veterans' Administration*, 961 F.2d 1367 (8th Cir. 1992), and *Larrabee by Jones v. Derwinski*, 968 F.2d 1497 (2nd Cir. 1992), in support of their argument that Congress intended the broader interpretation of section 511(a). In *Hicks* the Eighth Circuit held that section 511(a) precluded a constitutional claim in the district courts. *Hicks*, 961 F.2d at 1370. The court based its conclusion on the grant of exclusive jurisdiction in 38 U.S.C. § 7292(c) to the Federal Circuit "to interpret constitutional and statutory provisions, to the extent presented and *necessary to a decision*" and the provision in section 7292(d)(1) that the Federal Circuit "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." *See Hicks*, 961 F.2d at 1369 (emphasis added). The court's conclusion, however, begs the question of whether a constitutional claim involves a question that is "necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." *See* 38 U.S.C. § 511(a). If a claim does not fall within the Secretary's exclusive authority to decide "all questions of law or fact necessary to a decision by the Secretary under a law that affects the provision of benefits," neither the Board of Veterans' Appeals, the Court of Veterans Appeals, nor the Court of Appeals for the Federal Circuit has any jurisdiction to review such a claim. *See* 38 U.S.C. § 7104(a) (the Board of Veterans' Appeals has jurisdiction to review all questions in a matter which

under section 511(a) is subject to decision by the Secretary); 38 U.S.C. § 7252(a) (the Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals); 38 U.S.C. § 7292(a) (the Federal Circuit may review decisions of the Court of Veterans Appeals). The court in *Hicks* completely ignored the Supreme Court's opinion in *Traynor* and never addressed the effect of the 1988 amendment on the scope of judicial review. *See Hicks*, 961 F.2d 1369-70. As a result, the Eighth Circuit failed to apply the presumption in favor of judicial review of administrative action. *See Traynor*, 485 U.S. at 542.

In concluding that the VJRA broadened the judicial review preclusion provision, the Second Circuit erroneously relied upon House Report 963 instead of the Explanatory Statement on Compromise Agreement. *See Jones*, 968 F.2d at 1500-01 (citing H.R. REP. NO. 963 as evidencing Congress' concern that "the Court's opinion in *Traynor* would inevitably lead to increased involvement of the judiciary in technical VA decision-making"). The court in *Jones* concluded that Congress intended to preclude judicial review of the substantive and procedural due process claims raised in that case despite its characterization of the 1970 version of section 211(a) as substantially similar to the current section 511(a). *Id.* at 1500; *see also Sugrue v. Derwinski*, 26 F.3d 8, 11 n.2 (2nd Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2245, 132 L.Ed.2d 254 (1995).

5. The Court of Appeals in this Case Failed to Consider *Traynor v. Turnage*

The Secretary and the individual Defendants argue that the district court has no jurisdiction to entertain cases such as this because section 511(a) requires all

questions of law or fact, regardless of whether they arise under a law that affects the provision of benefits, to be decided by the Secretary, with any appeal to be pursued according to the procedures established by the VJRA. And the court of appeals in this case, without any reference to this Court's opinion in *Traynor*, concluded that the district court lacked subject matter jurisdiction to consider Zuspann's complaints against the Secretary. *See Zuspann*, 60 F.3d at 1159-60 (citing *Sugrue*, 26 F.3d at 10-11; *Jones*, 968 F.2d at 1499-1501; *Hicks*, 961 F.2d at 1369). But because neither the text nor the legislative history of the VJRA provides clear and convincing evidence that Congress intended to preclude judicial review of the Department's discrimination against veterans solely on the basis of a disability in violation of the Rehabilitation Act and the Due Process Clause of the Fifth Amendment, the court of appeals erred in concluding that section 511(a) bars Zuspann's claims against the Secretary and the individual Defendants.

The failure of the court of appeals to properly examine the text and legislative history of the Veterans' Judicial Review Act of 1988 for "clear and convincing evidence" that Congress intended to further restrict the district court's jurisdiction to hear challenges to the lawfulness or constitutionality of the Department's policies or procedures, particularly claims which do not involve a regulation promulgated pursuant to any statute dealing with veterans' benefits, makes this an appropriate case to review the scope of the current judicial review preclusion provision.

B. Zuspann's Claims Under the Rehabilitation Act of 1973 and the Due Process Clause of the Fifth Amendment to the United States Constitution Are Not Precluded by 38 U.S.C. § 511(a)

The Secretary and the individual Defendants argue that 38 U.S.C. § 511(a) gives the Secretary exclusive jurisdiction to decide all questions of law and fact necessary to a decision by the Secretary, regardless of whether they arise under a law that affects the provision of benefits by the Secretary to veterans.

1. Section 511(a) Does Not Bar Zuspann's Claims Against the Secretary

Section 511(a) provides:

> (a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a). (App. 26).

None of the exceptions in section 511(b) gives the district court jurisdiction in this case. The crucial inquiry, consequently, is whether Zuspann's complaint challenges "a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . ." *See Jones*, 968 F.2d at 1499; *Hicks*, 961 F.2d at 1369-70. Zuspann does not challenge a decision by the Secretary "under a law that affects the provision of benefits by the Secretary to veterans." Based upon "the decision by the

Secretary" that Zuspann has a service connected disability rated at 50% or more, there is no dispute that Zuspann is entitled to medical care for any disability from which he suffers under the "law that affects the provision of benefits." *See* 38 U.S.C. §§ 1710(a)(1)(D), 1712(a)(1)(B). And Zuspann does not dispute the Department's diagnosis of his condition. Instead, Zuspann complains that, solely on the basis of a disability covered by the Rehabilitation Act, the Department has excluded him from participation in, denied him the benefits of, and subjected him to discrimination under its program for providing medical care to otherwise qualified veterans. *See* 29 U.S.C. § 794. (App. 23-26). Furthermore, Zuspann complains that such discrimination has arbitrarily and capriciously denied him of a constitutionally protected property interest in violation of the Due Process Clause of the Fifth Amendment. U.S. CONST. amend V. (App. 23).

Section 504 of the Rehabilitation Act prohibits an executive department of the United States government from discriminating against an otherwise qualified individual solely on the basis of a disability. 29 U.S.C. § 794(a). Specifically, the Department of Veterans Affairs may not discriminate against an otherwise qualified veteran in the provision of medical care solely on the basis of a disability covered by the Rehabilitation Act. The Secretary's and the individual Defendants' discrimination against Zuspann in the provision of medical care solely on the basis of its diagnosis of Zuspann as chemically sensitive violates the Rehabilitation Act. In addition, such discrimination has arbitrarily and capriciously denied Zuspann of a constitutionally protected property interest in violation of the Due Process Clause of the Fifth Amendment.

Zuspann's complaint, challenging the Department's discrimination against him solely on the basis of a disability covered by the Rehabilitation Act and in violation of the Due Process Clause of the Fifth Amendment, fits squarely within the narrow interpretation followed by the Supreme Court in *Traynor* and expressed by Congress in its passage of the VJRA following the compromise agreement. Zuspann does not seek review of the statutes or regulations that entitle him to medical care necessary to treat any condition from which he suffers or the Secretary's decision regarding his service connected disability rating. Instead, Zuspann challenges, as did the veterans in *Traynor* and *Marozsan*, the Secretary's and the individual Defendants' policies and procedures that discriminate against him in violation of the Rehabilitation Act and the Due Process Clause of the Fifth Amendment.

The Secretary and the individual Defendants characterize Zuspann's claims as involving a determination of veterans' benefits. Zuspann's complaint, however, does not necessitate a review of the statutory benefits scheme or of his service connected disability rating because the Secretary has already determined that Zuspann is entitled to benefits. An attempt to characterize the Department's refusal to recognize chemical sensitivity as a medical determination likewise begs the question raised by Zuspann's complaint. Three physicians, either employed or retained by the Department of Veterans Affairs, examined Zuspann and determined that his condition is consistent with a diagnosis of chemical sensitivity. The Secretary does not dispute the diagnosis by the Department physicians. Instead, the Department refuses to recognize chemical sensitivity as a bona fide disease. But because Zuspann is an otherwise qualified veteran with a disability rated at 50% or more by the Secretary, how the

Department chooses to describe Zuspann's condition is of no consequence. Under the statutes governing veterans' benefits, Zuspann is entitled to medical treatment for any condition from which he suffers. While Zuspann is not entitled to second-guess the diagnosis of Department physicians, to choose the appropriate medication, or even to demand treatment in a particular type of facility, he does retain the right, notwithstanding section 511(a), to complain in federal district court that the Secretary has unlawfully discriminated against him by adopting a policy that the Department does not recognize the condition which its physicians have diagnosed him with. It is the Department's procedure by which it arbitrarily excludes veterans whom it has classified as having symptoms associated with chemical sensitivity from participation in its program of providing medical care, rather than a decision to deny a particular medical treatment to Zuspann, that constitutes a reviewable violation of the Rehabilitation Act and the Due Process Clause of the Fifth Amendment. *See Marozsan*, 852 F.2d at 1472 (holding that a suit seeking review of the methods – rather than the decision – of the Administrator is not essentially a suit to recover veterans' benefits). Because Zuspann's complaint raises questions of law and fact, not under "a law that affects the provision of benefits," but under the Rehabilitation Act and the Due Process Clause of the Fifth Amendment, section 511(a) does not preclude the district court from assuming jurisdiction over this case.

2. Zuspann's *Bivens* Claims Against the Individual Defendants Are Not Barred by the VJRA

Although the district court failed to exercise its subject matter jurisdiction to determine whether Zuspann

had a constitutional claim against the individual Defendants, the court of appeals held that Zuspann failed to state a claim upon which relief could be granted against the individual Defendants. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Because Zuspann's claims do not fall within the scope of section 511(a) or the "exclusive review procedure for decisions involving veterans' benefits determinations," there is no "congressional determination foreclosing" Zuspann's *Bivens* action. *See Bush v. Lucas*, 462 U.S. 367, 377-78, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). Unlike the claims raised in *Sugrue*, Zuspann's complaint against the individual Defendants is not based upon their acts or omissions concerning the assignment of a disability rating or the level of benefits to which he is entitled. *See Sugrue*, 26 F.3d at 12. And because there are no "special factors counselling hesitation" against recognition of Zuspann's *Bivens* action, the lower courts erred in dismissing his complaint against the individual Defendants. *See Bivens*, 403 U.S. at 396.

C. The Issue in this Case is of Substantial Importance to All Veterans

As in *Traynor v. Turnage*, this Court is being asked to consider the district court's jurisdiction to determine whether a Department policy or procedure, which does not involve a question of law or fact arising under a veterans' benefits statute or a regulation promulgated pursuant to such a statute, violates section 504 of the Rehabilitation Act of 1973. This issue is of substantial importance to all veterans because the Secretary continues to take the position that all challenges to the Department's actions, regardless of whether they arise under a law that affects the provision of benefits, must be

pursued according to the procedures established by the Veterans' Judicial Review Act of 1988.

As the Supreme Court recognized in *Thunder Basin Coal Co. v. Reich*, ___ U.S. ___, 114 S.Ct. 771, 779, 127 L.Ed.2d 29 (1994), the district court retains jurisdiction over claims considered "wholly collateral" to a statute's judicial review preclusion provisions and outside the agency's expertise, particularly where a finding of preclusion could foreclose all meaningful judicial review. In addition to declaratory relief, Zuspann is seeking compensation for his medical expenses, damages for his pain and suffering, punitive damages, and attorneys' fees. Even if Zuspann's complaint challenged a decision by the Secretary under a law that affects the provision of benefits, an administrative appeal under the procedures established by the VJRA would entitle Zuspann only to a judicial declaration that the Department's refusal to recognize chemical sensitivity was unlawful or unconstitutional.

Under the Rehabilitation Act, the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 are available to any person aggrieved by any act or failure to act by any Federal provider of assistance under section 794. *See* 29 U.S.C. § 794a. In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-31, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984), the Court held that the 1978 amendment to the Rehabilitation Act of 1973, which expressly incorporated the remedies set forth in Title VI, authorizes an award of backpay. Likewise, a majority of the Court in *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI. *See also*

Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). And in *Doe v. Attorney General*, 941 F.2d 780, 789 (9th Cir. 1990), the Ninth Circuit recognized a private right of action for monetary damages against the federal government for violating section 504 of the Rehabilitation Act. *Contra Dorsey v. United States Department of Labor*, 41 F.3d 1551 (D.C. Cir. 1994). Furthermore, the Sixth Circuit recently held that punitive damages are an available remedy under section 504 of the Rehabilitation Act. *Moreno v. Consolidated Rail Corp.*, 63 F.3d 1404, 1418 (6th Cir. 1995). Finally, 29 U.S.C. § 794a(b) expressly authorizes the court to award reasonable attorneys' fees to the prevailing party (other than the United States) in any action or proceeding to enforce or charge a violation of the Rehabilitation Act. In light of the damages caused by the Department's unlawful and unconstitutional discrimination against Zuspann and the remedies available under the Rehabilitation Act, an administrative appeal would afford no meaningful review to Zuspann.

Although the Secretary and the individual Defendants have produced no "clear and convincing evidence" that Congress intended to preclude judicial review of the Department's unlawful and unconstitutional discrimination against otherwise qualified veterans, the lower courts continue to characterize veterans' complaints against the Department of Veterans Affairs, regardless of whether they involve questions of law or fact arising under a law that affects the provision of benefits, as merely benefits determination cases over which the district courts have no jurisdiction. *See Zuspann*, 60 F.3d at 1158-59. In this case, despite the Department's favorable benefits determination that Zuspann has a service-connected disability rated at 50% or more and is thus entitled

to medical care for any disability from which he suffers, the Secretary and the individual Defendants have intentionally discriminated against Zuspann in the provision of benefits to which he is entitled as an otherwise qualified veteran.

The scope of the current judicial review preclusion provision has not been settled by this Court since Congress enacted the Veterans' Judicial Review Act of 1988. Because the district court's jurisdiction to hear claims that Congress did not intend to preclude is of substantial importance to all veterans, the scope of section 511(a) is an important question of federal law that should be settled by the Supreme Court.

CONCLUSION

Zuspann's petition for writ of certiorari should be granted because the court of appeals erred in concluding that his claims under the Rehabilitation Act and the Due Process Clause of the Fifth Amendment were precluded by 38 U.S.C. § 511(a). Neither the text nor the legislative history of the Veterans' Judicial Review Act of 1988 provides the "clear and convincing" evidence of congressional intent required by this Court before a statute will be construed to restrict access to judicial review of administrative action. *See Traynor*, 485 U.S. at 542. Accordingly, Zuspann's claims that the Secretary and the individual Defendants have discriminated against him in the provision of medical care solely on the basis of a disability in violation of the Rehabilitation Act of 1973 and denied him of a constitutionally protected property interest in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution are not precluded from judicial review in the district court by 38 U.S.C. § 511(a). Because the court of appeals in this case

erred in concluding that the Veterans' Judicial Review Act of 1988 precludes Zuspann from challenging, in federal district court, policies and procedures of the Department of Veterans Affairs that violate the Rehabilitation Act of 1973 and the Due Process Clause of the Fifth Amendment to the United States Constitution, and because the scope of the judicial review preclusion provision of section 511(a) is of substantial importance to all veterans, Zuspann respectfully prays that this Court grant this petition for writ of certiorari.

Respectfully submitted,

James E. Wren
State Bar of Texas No. 22018200
Laura E. Still
State Bar of Texas No. 19238320
C. Alfred Mackenzie*
State Bar of Texas No. 12761550
Haley & Davis, P.C.
510 North Valley Mills Drive,
Suite 600
Waco, Texas 76710
(817) 776-3336
(817) 776-6823 FAX

and

Robert L. McHaney, Jr.
State Bar of Texas No. 13670200
6613 Sanger Avenue
Waco, Texas 76710
(817) 776-3611
(817) 776-9217 FAX

Attorneys for the Petitioner,
Gary Zuspann
*Counsel of Record

Gary ZUSPANN, Plaintiff-Appellant,

v.

Jesse BROWN, Secretary of the Department of Veterans Affairs, et al., Defendants-Appellees.

No. 94-50698.

United States Court of Appeals,

Fifth Circuit.

Aug. 11, 1995.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

WISDOM, Circuit Judge:

The plaintiff/appellant, Gary Zuspann, appeals from the district court's dismissal of his cause of action. We affirm.

I

Gary Zuspann served as a Navy cook on the U.S.S. New Orleans during the war in the Persian Gulf. While the ship was anchored in the Persian Gulf, Zuspann was exposed to a variety of pollutants: smoke and debris from oil wells burning nearby, oil-contaminated water from the Gulf, and exhaust fumes from the ship's generator. After his tour of duty in the Persian Gulf, Zuspann went to the Philippines, where he came into contact with silica-containing volcanic ash while helping to clean up after a volcanic eruption.

When Zuspann returned to the United States, he began to suffer neck and back pain, weight loss, headaches, and respiratory problems. He has been unable to hold a civilian job due to his ailments. After treatment failed at two Veterans' Administration (VA) facilities, Zuspann was transferred to a research center in Houston that specializes in the complaints of Persian Gulf veterans. Having been given a 70 percent disability rating, Zuspann qualified for treatment.

Two private physicians in Houston concluded that Zuspann's symptoms were consistent with a condition called "chemical sensitivity". One recommended that Zuspann be tested in an "environmental unit" to determine which chemicals caused Zuspann difficulty. Dr. Susan Mather, the Department physician in charge of investigating complaints of Persian Gulf veterans, concluded that "chemical sensitivity" was not the correct diagnosis for Zuspann's condition. In Dr. Mather's opinion, "chemical sensitivity" is not a true medical condition. Based on Dr. Mather's diagnosis, the Department decided to deny Zuspann treatment in an environmental unit. The VA discharged Zuspann and refused him additional treatment. Since his discharge, Zuspann has amassed $400,000 in medical bills.

Zuspann brought suit in federal district court against four defendants in their capacities as VA officials: Jesse Brown, Wallace Hopkins, Dr. Susan Mather, and Dr. Edward Young. Zuspann alleged that the defendants denied him adequate medical care in violation of the

Rehabilitation Act of 1972[1] and the Due Process Clause of the Fifth Amendment. Zuspann also brought a *Bivens*[2] action against three of the defendants in their individual capacities, Hopkins, Mather, and Young, alleging that they denied him a constitutionally protected property interest in his medical benefits as a veteran. The defendants filed motions to dismiss the complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction under 38 U.S.C. § 511(a). The district court dismissed Zuspann's suit without prejudice, and Zuspann appeals.

II

Zuspann's first argument on appeal challenges the district court's dismissal under § 511(a) of his actions under the Fifth Amendment and the Rehabilitation Act. We review de novo the district court's dismissal for lack of subject matter jurisdiction.[3]

To determine whether the district court correctly dismissed this case under § 511(a), we ask one question: whether the plaintiff is alleging a facial attack on the constitutionality of an act of Congress, or whether the plaintiff is challenging the VA's decision to deny him benefits. If Zuspann makes a facial challenge to a statute,

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[1] 29 U.S.C. §§ 701-797(b) (1985).

[2] In *Bivens v. Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court established that the Constitution, in some circumstances, may support private causes of action against federal officials for constitutional torts.

[3] *Herbert v. United States*, 53 F.3d 720, 722 (5th Cir.1995).

then the district court has jurisdiction to hear his case. If, on the other hand, Zuspann challenges the VA's decision to deny him benefits, the district court does not have jurisdiction and properly dismissed his complaint. We hold that the district court has no jurisdiction over Zuspann's action against the defendants in their official capacities for alleged violations of the Rehabilitation Act and the Fifth Amendment.

Federal courts are courts of limited jurisdiction. Section 511 of Title 38, formerly § 211, precludes judicial review of veterans' benefits determinations. The 1970 version of § 211(a) provided that:

> the decisions of the Administrator on any question of law or fact under any law administered by the Veteran's Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.[4]

In *Johnson v. Robinson*,[5] the Supreme Court held that § 211(a) precluded judicial review of decisions "made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts", but did not preclude review of the very statute itself.[6] Under *Johnson*, this Court has held that § 211 does

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[4] 38 U.S.C. § 211(a), (*quoted in Johnson v. Robison*, 415 U.S. 361, 365 n. 5, 94 S.Ct. 1160, 1165 n. 5, 39 L.Ed.2d 389 (1974)).

[5] 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974).

[6] *Id.* at 367, 94 S.Ct. at 1165-66.

not bar suits in federal district court challenging the constitutionality of the statutes underlying the veterans' benefits program, but that § 211 does bar challenges to individual benefits determinations.[7]

The current version of § 511 provides:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to [the exceptions listed in] subsection (b), the decision of the secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.[8]

In 1988, Congress passed the Veterans' Judicial Review Act ("VJRA"),[9] which clearly announced the intent of Congress to preclude review of benefits determinations in federal district courts. The VJRA also created an exclusive review procedure by which veterans may resolve their disagreements with the Department of Veterans Affairs. The VJRA allows veterans to appeal benefits determinations to the Board of Veterans' Appeals.[10] Jurisdiction to review the Board's decisions is conferred exclusively on the Court of Veterans Appeals.[11]

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[7] *Anderson v. Veterans Administration*, 559 F.2d 935, 936 (5th Cir.1977).

[8] 38 U.S.C. § 511(a) (1991).

[9] 38 U.S.C. § 7251 (1991).

[10] 38 U.S.C. § 7104(a) (1995).

[11] 38 U.S.C. §§ 7252(a), 7266(a) (1995).

The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review the decisions of the Court of Veterans Appeals.[12] Congress expressly gave the Federal Circuit Court of Appeals "exclusive jurisdiction" to "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision".[13]

Since the enactment of the VJRA, federal courts have refused to entertain constitutional claims if they are based on the VA's actions in a particular case.[14]

Our inquiry in this case focuses on whether Zuspann's complaint challenges the VA's decision to deny him benefits, or whether it makes a facial challenge to an act of Congress. The district court concluded that Zuspann did not make a facial attack, but instead merely was "complaining about a denial of benefits".[15] We agree with the district court.

Although Zuspann attempts to fashion his complaint in constitutional terms, his complaint is an individualized challenge to the VA's decision to deny him benefits. The gravamen of Zuspann's complaint is that he requested a chemical free living area, but the VA decided not to

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[12] 38 U.S.C. § 7292 (1991).

[13] 38 U.S.C. § 7292(c) (1991).

[14] *Sugrue v. Derwinski*, 26 F.3d 8, 10-11 (2d Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2245, 132 L.Ed.2d 254 (1995); *Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1499-1501 (2d Cir.1992); *Hicks v. Veterans Administration*, 961 F.2d 1367, 1369 (8th Cir.1992).

[15] *Zuspann v. Brown*, 864 F.Supp. 17, 21 (W.D.Tex.1994).

provide one. Zuspann's complaint seeks a judicial declaration that he is handicapped by chemical sensitivity and that the VA is required to provide him with a chemical free living environment. Based on the VA's allegedly erroneous decision to deny him benefits, Zuspann seeks compensation for his medical bills, damages for his pain and suffering, punitive damages, and attorney's fees. Zuspann's complaint frames his contentions as violations of the Rehabilitation Act and the Fifth Amendment, but federal district courts "do not acquire jurisdiction to hear challenges to benefits determinations merely because those challenges are cloaked in constitutional terms".[16]

Zuspann also asserts in his complaint that he is challenging the policies and regulations of the secretary, but we agree with the district court that he "fails to specifically point to a policy or regulation that prevents [him] from obtaining medical care".[17] Indeed, Zuspann responded to the defendants' motion to dismiss the complaint by arguing that he "[did] not seek a systematic change in agency, policies or regulations".[18] Instead, Zuspann challenged the individual denial of benefits in his case. That Zuspann couches his challenge to the benefits determination in constitutional terms does not

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[16] *Sugrue*, 26 F.3d at 11.

[17] *Zuspann*, 864 F.Supp. at 21.

[18] Zuspann argued that he "[did] not seek a systematic change in agency policies or regulations; rather, Zuspann challenges the Department's refusal to officially acknowledge chemical sensitivity and provide him the medical care he is entitled to receive, in violation of the Rehabilitation Act". Record at 263.

remove it from § 511's preclusion of judicial review of benefits decisions.[19]

Whether the benefits determination made in this case was right or wrong is not the issue in this case. The issue in whether the plaintiff may bring this case in federal district court. We express no opinion about the merits of Zuspann's case, and hold that federal district court is not the correct forum in which to bring this case. Congress has set up an exclusive review procedure for decisions involving veterans' benefits determinations, and the district court in this case correctly concluded that it lacked subject matter jurisdiction to hear Zuspann's challenge to the VA's decision to deny him benefits.

III

Zuspann's second argument on appeal challenges the dismissal of his *Bivens* action against the defendants Hopkins, Mather, and Young.

The defendants filed a motion to dismiss the *Bivens* action, arguing that the district court lacked jurisdiction to hear the contention and that the plaintiff failed to state a claim upon which relief could be granted. The district court found it lacked jurisdiction to hear the *Bivens* action. We are free to uphold the district court's judgment on any basis that is supported by the record;[20] no cause of

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[19] *See, e.g., Sugrue*, 26 F.3d at 11; *Anderson*, 559 F.2d at 936.

[20] *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1094 n. 12 (5th Cir.1981). *See also Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir.1979); *Raven v. Panama Canal Co.*, 583 F.2d 169, 171 (5th Cir.1978), *cert. denied*, 440 U.S. 980, 99 S.Ct. 1787, 60 L.Ed.2d 240 (1979).

action lies against the VA employees in their individual capacities. Because the plaintiff fails to state a claim upon which relief can be granted, we affirm the dismissal of the plaintiff's *Bivens* action.[21]

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court established that the Constitution may support a private cause of action against federal officials for constitutional torts and allowed the victims of a Fourth Amendment violation by federal officers to bring suit against the officers for money damages in federal court.[22] In *Bivens*, there were "no special factors counselling hesitation in the absence of affirmative action by Congress",[23] and the absence of a federal statutory basis for the cause of action was not an obstacle to the award of damages. The Supreme Court has allowed *Bivens* actions in situations where, as in *Bivens* itself, there were no "special factors counselling hesitation in the absence of affirmative action by Congress", no statutory prohibition against the relief sought, and no exclusive statutory remedy.[24]

Where there are "special factors counselling hesitation", however, the Supreme Court has been reluctant to

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[21] We do not reach the question of whether Zuspann had federal jurisdiction for this claim.

[22] *Bivens*, 403 U.S. 388, 394, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619 (1983).

[23] *Id.* at 396, 91 S.Ct. at 2004-05.

[24] *Schweiker v. Chilicky*, 487 U.S. 412, 421, 108 S.Ct. 2460, 2466-67, 101 L.Ed.2d 370 (1988) (*citing Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) and *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979)).

extend *Bivens* remedies to new contexts. In *Bush v. Lucas*, the Supreme Court declined to find that an employee of the National Aeronautics and Space Administration had a private right of action against the director of the George C. Marshall Space Center for alleged violations of the employee's First Amendment rights. No *Bivens* right of action exists, the Court concluded, in a situation in which federal legislation had already set up "an elaborate remedial system that ha[d] been constructed step by step, with careful attention to conflicting policy considerations".[25] Similarly, in *Chappell v. Wallace* the Supreme Court declined to find *Bivens* remedy for military personnel who were injured by the allegedly unconstitutional actions of superior officers.[26]

In *Schweiker v. Chilicky*,[27] the Supreme Court considered whether a *Bivens* remedy existed for alleged due process violations in the denial of social security disability benefits. The Court remarked that the remedial scheme Congress created to safeguard the rights of social security recipients was "considerably more elaborate than the civil service system considered in *Bush*", and declined to recognize a *Bivens* remedy against the state and federal officials who administered the benefits program. Finally, the Supreme Court held last Term in *FDIC v. Meyer* that no *Bivens* action lies against federal agencies.[28]

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[25] *Bush v. Lucas*, 462 U.S. 367, 388, 103 S.Ct. 2404, 2416-17, 76 L.Ed.2d 648 (1983).

[26] 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).

[27] 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988).

[28] ___ U.S. ___, ___, 114 S.Ct. 996, 1006, 127 L.Ed.2d 308 (1994).

We agree with the Second Circuit Court of Appeals that the reasoning of *Bush* and *Chilicky* applies in the context of veterans' benefits, and that no *Bivens* remedy exists against VA employees.[29] Special factors counsel hesitation to create a *Bivens* remedy in this case. This is a situation in which Congress has set up an elaborate remedial structure; the administrative process created by Congress provides for a comprehensive review of veterans' benefits disputes. Further, Congress has explicitly precluded judicial review of veterans' benefits disputes, which suggests that Congress' failure to create a remedy against individual VA employees was "not an oversight".[30]

We hold that no *Bivens* remedy lies against the individual employees of the VA. The district court properly dismissed both Zuspann's *Bivens* action and his challenge to the VA's denial of benefits.

The judgment of the district court is affirmed.

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[29] *Sugrue v. Derwinski*, 26 F.3d 8, 12-13 (2d Cir.1994).

[30] *Id.* at 12.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

GARY ZUSPANN, Plaintiff, v. JESSE BROWN, Secretary of the Department of Veteran Affairs, WALLACE HOPKINS, DR. EDWARD YOUNG, and DR. SUSAN MATHER, Defendants.	§ § § § § § § § § § §	Civil No. W-94-CA-058

ORDER

(Filed Sept. 13, 1994)

Came on to be considered the Motion to Dismiss of Defendants Hopkins, Mather and Young, and the Secretary's Motion to Dismiss.

I. Background

This is a civil action filed by Gary Zuspann, a handicapped veteran of the United States Navy, against the Secretary of the Department of Veteran Affairs; Dr. Edward Young, Chief of Staff at the Department of Veterans Affairs Hospital in Houston; Dr. Susan Mather, a Department physician in the office of the Undersecretary of Health; and Wallace Hopkins, Director of the Department of Veteran Affairs in Waco.

Plaintiff claims that he has been denied medical care, including life-sustaining medical treatment, to which he is entitled as a United States Veteran. Plaintiff claims that this denial of medical care violates the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, and the Fifth Amendment of the United States Constitution. Plaintiff also brings a Bivens action against Defendants Young, Mather, and Hopkins for deprivation of Plaintiff's constitutionally protected property interest in his disability benefits. Plaintiff seeks declaratory relief, compensatory and punitive damages.

Plaintiff's claims arise out of his service with the Navy in Operation Desert Storm. Plaintiff was a mess cook on board the surface vessel, the U.S.S. New Orleans. While anchored in the Persian Gulf during the war, the crew of the U.S.S. New Orleans could see burning oil wells from Iraq, and Plaintiff was exposed to smoke and debris from these fires. Oil slicks were also visible on the surface of the Persian Gulf, and the U.S.S. New Orleans relied on the Gulf for its water supply. In March of 1991, the main power supply of the U.S.S. New Orleans failed, and a portable diesel fuel generator was used for power. The exhaust from this equipment permeated the entire ship for about six months. This was especially a problem because the ventilation system on board the ship was inoperable. The smell of hydrogen sulfide was often present on the ship, and reservoirs of diesel fuel directly above the Plaintiff's sleeping area were opened on numerous occasions.

After his service on board the U.S.S. New Orleans, the Plaintiff and other crewmembers disembarked in the Philippines and were ordered to assist in the clean up of

ash and debris from a recent volcanic eruption. Unlike the volunteers from organizations assisting with the cleanup, the Plaintiff and crew were not given protective clothing and respirators to protect them from the dangerous volcanic ash (which contained quantities of silica).

The Plaintiff was then flown from the Philippines back to the mainland of the United States. After returning to Texas, the Plaintiff's health began to quickly deteriorate. After numerous examinations by V.A. doctors, the Plaintiff was examined by Dr. Claudia Miller, a physician specializing in environmental and occupational medicine. Dr. Miller concluded that Plaintiff's symptoms were compatible with the disease known as chemical sensitivity and recommended that he be sent to an environmental unit for diagnosis, and that various allergy tests be conducted. Dr. Hamill, the Plaintiff's attending physician in Houston, likewise diagnosed the Plaintiff with having symptoms compatible with chemical sensitivity. Finally, even Dr. Susan Mather concluded that chemical sensitivity was descriptive of Plaintiff's conditions.

Despite this diagnosis, the Plaintiff contends that the Department has refused to provide treatment for chemical sensitivity. In fact, the Department refuses to recognize chemical sensitivity as a valid illness, despite the fact that numerous Persian Gulf veterans have suffered similar symptoms. The Plaintiff has been hospitalized several times in private hospitals for treatment since the Department's refusal to recognize his illness, but the Plaintiff is unable to pay such large hospital bills.

II. Motion to Dismiss

A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) may be based on the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ynclan v. Department of Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991). However, a motion that constitutes an attack on the subject matter jurisdiction of the court occurs when the motion refers to matters outside the pleadings, such as affidavits or testimony. *Oaxaca v. Roscoe*, 641 F.2d 386, 389 (5th Cir. 1981). A court may consider affidavits and/or testimony when a party is making an attack on the court's jurisdiction. *Id.* at 389.

III. Discussion

In order to properly file a suit in federal court, the plaintiff must establish that the court has jurisdiction to hear the case. A federal court's jurisdiction can be based on either diversity of citizenship or a federal question. Diversity of citizenship creates federal jurisdiction when a suit is between "citizens of a State, and foreign states or citizens or subjects thereof." 28 U.S.C. § 1332(a)(2); *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1064 (5th Cir. 1992). Federal jurisdiction based on a federal question exists when either: 1) some substantial, disputed question of law is a necessary element of one of the well-pleaded state claims; or, 2) one of the claims is effectively one of federal law. *NGS American, Inc. v. Barnes*, 805 F.Supp. 462, 464 (W.D.Tex. 1992). The plaintiff in this case

maintains that the court's jurisdiction is based on a federal question.

Congress, however, may limit the jurisdiction of a federal court, and has done so in this case. Through 38 U.S.C. § 511, Congress has expressly indicated that a federal court's jurisdiction to hear disputes involving veteran's benefits is to be of a limited nature.

This Act, § 511, creates a specific appellate review structure for disputes involving veterans and the Department of Veteran Affairs. The process begins with a decision being made at the Department level. If the veteran disagrees with the Department's decision, the veteran may appeal within the VA by filing a notice of disagreement with the Board of Veterans Appeals. 38 U.S.C. 7105. The Board's decision is the final decision of the Secretary. 38 U.S.C. 7104.[1] Review of the Secretary's final decision is governed by Chapter 72 of Title 38 of the United States Code. A veteran desiring to appeal the Secretary's decision must file a notice of appeal. 38 U.S.C. § 7266(a). The Court of Veterans Appeals has "exclusive jurisdiction" to review the decisions of the Board of Veterans Appeals. 38

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[1] The present Act, the Veterans Judicial Review Act of 1988, located at 38 USC § 511 provides the following:

> "(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by action in the nature of mandamus or otherwise." 38 U.S.C. § 511.

U.S.C. § 7252(a); *Strott v. Derwinski*, 964 F.2d 1124, 1126 (Fed Cir. 1992)(stating that "Congress created the Veterans Court in part to provide judicial review of veteran's benefits decisions [,and that] [p]rior to the Act, there existed a statutory bar to such judicial review."). Any appeals from the Court of Veteran Appeals must be filed with the Court of Appeals for the Federal Circuit. 38 U.S.C. § 7292. The detailed nature of the procedural and appellate structure contained within the Veterans' Judicial Review Act clearly indicate Congress' intent to confine decisions affecting veteran's benefits within this structure.

In cases involving veteran's benefits, many courts have held that § 511, and its precursor § 211(a), limits the federal judiciary's ability to exercise jurisdiction over suits involving veteran benefits. The key determinant in whether the federal court lacks jurisdiction to decide the dispute is dependant upon whether the veteran is challenging the day-to-day determination and interpretation of VA policy or making a constitutional attack on a statute.

For instance in *Ryan v. Cleland*, the court dismissed the plaintiff's claims for lack of jurisdiction because the plaintiff was challenging the day-to-day determination of VA policy. 531 F. Supp. 724 (E.D.N.Y 1982). In that case, a group of Vietnam veterans sought to force the V.A. to recognize and treat veterans for injuries they allegedly suffered from exposure to dioxin. The court held that the veterans' claims of entitlement to medical benefits did not rise to the level of a constitutional violation. *Id.* at 732. Thus, § 211(a) was a complete bar to the court

asserting jurisdiction over the veterans' claims. Complaints about the quality and type of care provided was precisely the disputes Congress intended to preclude from judicial review with the passage of § 211(a). Id. at 732.

Since *Ryan*, the Second and Eighth Circuits have addressed the issue of when federal courts have the jurisdiction to resolve disputes involving veteran benefits. In *Larrabee By Jones v. Derwinski*, the Second Circuit distinguished constitutional claims that attack the statute as drafted from claims that attack the statute as applied. 968 F.2d 1497, 1500 (2nd Cir. 1992). Section 211(a) precludes judicial review of non-constitutional claims, and a plaintiff may not circumvent the jurisdictional limitations imposed by § 211(a) by alleging damages for a constitutional violation arising out of a denial of benefits. *Id.* at 1500; *Pappanikoloaou v. Administrator of the Veterans Admin.*, 762 F.2d 8, 9 (2nd Cir.) (per curiam), *cert. denied*, 474 U.S. 851, 106 S.Ct. 150, 88 L.Ed.2d 124 (1985); *Tietjen v. United States Veterans Admin.*, 884 F.2d 514, 515 (9th Cir. 1989); *Higgins v. Kelley*, 824 F.2d 690, 691 (8th Cir. 1987); *Hiljer v. Waters*, 749 F.2d 1553 (11th Cir. (per curiam), *cert. denied*, 472 U.S. 1029, 105 S.Ct. 3506, 87 L.Ed. 637 (1985); *Anderson v. Veterans Admin.*, 559 F.2d 935, 936 (5th Cir. 1977) (per curiam); *Hartman v. United States*, 615 F.Supp. 446, 449 (E.D.N.Y. 1985). Thus, § 211(a) precludes a federal court from exercising jurisdiction over claims seeking a particular type or level of care for veterans even when the claim is cloaked in constitutional terms. Congress' amendment to § 211 in 1988 foreclosed any possibility that federal courts could decide claims made by veterans that involved a denial of benefits or a level of care. The

statutory language and scheme of § 211 clearly indicate Congress intended to exclude all issues affecting veterans benefits, even constitutional issues, from the federal judicial system. *Larrabee By Jones*, 968 F.2d at 1501; *Hicks v. Veterans Admin.*, 961 F.2d 1367, 1370 (8th Cir 1992) (holding that the statute applies to "*all* questions of law and fact." 38 U.S.C. 511(a) emphasis added in original). ("The statute includes all claims, whatever their bases, as long as the claim is "necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans.") Id. at 1369.

Plaintiff in this case is not alleging a facial attack on the constitutionality of an Act of Congress. Instead, Plaintiff is merely complaining about a denial of benefits. Plaintiff asserts within his complaint that he is challenging the policies and regulations of the Secretary, but the Plaintiff fails to specifically point to a policy or regulation that prevents plaintiff from obtaining medical care. In fact, plaintiff later denies that he is seeking change in agency policy or regulations at all. See Plaintiff's Response to Secretary's Motion to dismiss plaintiff's complaint at 19.

The gravamen of plaintiff's complaint is that he requires a particular level of care, i.e., chemical free living area. And that because he is not being provided with a specific level and type of care, his constitutional rights are being violated.

Other courts that have addressed this issue have held that a veteran cannot escape Congress' intent to confine decisions involving veteran's benefits and level of care to the Department of Veterans Affairs by couching their

arguments in constitutional terms. Furthermore, given the complexity of the health problems experienced by the Persian Gulf War Veterans and the variance of opinion inherent in medical diagnoses and treatment, this is the very type of case that would enmesh the courts in expensive, time-consuming litigation (involving a battle of experts) that § 511's judicial bar was constructed to avoid. Congress intends that such decisions be made by the Veterans Administration in the first instance, with exclusive review, if any, in the recently-created Court of Veterans' Appeals. The plaintiff cannot be allowed to circumvent Congress' purpose in enacting § 511.

Therefore, this court lacks the jurisdiction to hear plaintiff's claims.

IV. Conclusion

Accordingly, it is

ORDERED that Defendant's Hopkins, Matter [sic], Young, and the Secretary's Motion to Dismiss is **GRANTED**. It is further

ORDERED that this case be **DISMISSED** without prejudice. It is further

ORDERED that any pending motions be **DENIED** as moot.

SIGNED this 13th day of September, 1994.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50698

D.C. Docket No. W-94-CA-58

GARY ZUSPANN,

Plaintiff-Appellant,

versus

JESSE BROWN, SECRETARY
OF THE DEPARTMENT OF
VETERANS AFFAIRS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, GARWOOD, and DAVIS, Circuit Judges.

JUDGMENT

(Filed Aug. 11, 1995)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

August 11, 1995

ISSUED AS MANDATE:

U.S. CONST. amend. V

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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29 U.S.C. § 794

§ 794. Nondiscrimination under federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any

program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers; exception

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the American with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(As amended Pub.L. 99-506, Title I, § 103(d)(2)(B), Title X, § 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub.L. 100-259, § 4, Mar. 22, 1988, 102 Stat. 29; Pub.L. 100-630, Title II, § 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub.L. 102-569, Title I, § 102(p)(32), Title V, § 506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub.L. 103-382, Title III, § 394(i)(2), Oct. 20, 1994, 108 Stat. 4029.)

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38 U.S.C. § 511

§ 511. Decisions of the Secretary; finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to –

(1) matters subject to section 502 of this title;

(2) matters covered by sections 1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.

(Added Pub.L. 102-83, § 2(a), Aug. 6, 1991, 105 Stat. 388.)

Excerpt from the Explanatory Statement on Compromise Agreement, 1988 U.S.C.C.A.N. 5834, 5834

EXPLANATORY STATEMENT ON COMPROMISE AGREEMENT ON DIVISION A

134 Congressional Record S 16650, October 18, 1988

This document explains the provisions of S. 11, the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act", as passed by the Senate on July 11, 1988; H.R. 5288, the proposed "Veterans' Judicial Review Act", as passed by the House of Representatives on October 3, 1988, as a substitute for the text of S. 11 (hereinafter referred to as the "House amendment"); and the provisions of a compromise agreement between the Senate and House Committees on Veterans' Affairs on those provisions, which will be offered as a proposed Senate amendment to the House amendment to S. 11 as so amended and passed by the Senate. The difference between these various measures and the provisions of the compromise agreement are noted below, except for clerical corrections, conforming changes made necessary by the compromise agreement, and minor drafting, technical, and clarifying changes.

TITLE I – ADJUDICATIVE AND RULEMAKING AUTHORITY OF THE VETERANS' ADMINISTRATION

Decisions by Administrator

Senate bill: The Senate bill (section 301) would amend section 211(a) of title 38, relating to decisions of the Administrator, to expand the present categories of exceptions to the general preclusion of judicial review of

such decisions by referencing new subchapter II of chapter 71, the new judicial review subchapter added by title III of the Senate bill.

House amendment: The House amendment (section 2) would amend section 211 to –

(a)(1) specify that the administrator must resolve all questions of law and fact – not only those arising under laws administered by the VA as under present section 211(a) – that are necessary to a decision under a law affecting the provision of benefits to veterans and the dependents and survivors of veterans, and (2) to expand the general preclusion of judicial review to the same extent;

(b) expand the present categories of exceptions to the general preclusion by making reference to section 223 of title 38 (as proposed to be added by section 3 of the House bill, discussed below), regarding rulemaking, and to matters covered by new chapter 71, the new judicial review subchapter added by title III of the bill;

(c) specify that the Attorney General, upon request, is to provide the Administrator with advice regarding any question of law arising under either the Constitution or any law other than a law providing benefits for veterans and the survivors and dependents of veterans.

Compromise agreement: The compromise agreement (section 101) contains the House provision with amendments (a) to clarify that the requirement to make decisions and the general preclusion of judicial review apply only to a decision by the Administrator under a

law that affects the provision of benefits by the Administrator; and (b) to delete the amendment relating to the Attorney General's opinion.

1970 amendment to former 38 U.S.C. § 211(a),
Pub. L. No. 91-376, § 8(a),
84 Stat. 787, 790 (1970) (amended 1988)

SEC. 8. (a) Subsection 211(a) of title 38, United States Code, is amended to read as follows:

"(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

Excerpt from the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, § 101, 102 Stat. 4105, 4105-06 (1988) (amended 1991)

SEC. 101. DECISIONS BY ADMINISTRATOR.

(a) MATTERS TO BE DECIDED BY ADMINISTRATOR. – Subsection (a) of section 211 is amended to read as follows:

"(a)(1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

"(2) The second sentence of paragraph (1) of this subsection does not apply to –

"(A) matters subject to section 223 of this title;

"(B) matters covered by sections 775 and 784 of this title;

"(C) matters arising under chapter 37 of this title; and

"(D) matters covered by chapter 72 of this title.".

(b) CONFORMING AMENDMENT. – Section 4004(a) is amended by striking out. "All questions on claims involving benefits under laws administered by the Veterans'

Administration" and inserting in lieu thereof "All questions in a matter which under section 211(a) of this title is subject to decision by the Administrator".

Supreme Court, U.S.
FILED
DEC 29 1995
CLERK

No. 95-696

In the Supreme Court of the United States

OCTOBER TERM, 1995

GARY ZUSPANN, PETITIONER

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
MARK C. NILES
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court had subject-matter jurisdiction over petitioner's claim for veterans' benefits.

2. Whether petitioner had a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of the Department of Veterans Affairs based on the denial of his claim for veterans' benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-696

GARY ZUSPANN, PETITIONER

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 60 F.3d 1156. The opinion of the district court (Pet. App. 12-20) is reported at 864 F. Supp. 17.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21-22) was entered on August 11, 1995. The petition for a writ of certiorari was filed on October 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Veterans of the armed services may receive compensation and medical treatment for service-connected disabilities. See 38 U.S.C. 1110, 1131, 1701 *et seq.*, 5101(a) (Supp. V 1993). If a veteran is dissatisfied with the initial decision of the Secretary of Veterans Affairs (VA) on a claim for disability benefits, the veteran generally may appeal that decision to the Board of Veterans' Appeals. 38 U.S.C. 7104(a) (Supp. V 1993). The Board then makes a "[f]inal decision[]" for the Secretary. *Ibid.*

Decisions of the Board are subject to review under the Veterans' Judicial Review Act (VJRA or Act), codified as Chapter 72 of Title 38. See Pub. L. No. 100-687, Div. A, Tit. III, § 301, 102 Stat. 4113 (1988). The Act provides that the Board's decisions may be reviewed only by the Court of Veterans Appeals (COVA), an Article I court of record. 38 U.S.C. 7251, 7252(a) (Supp. V 1993). Decisions of the COVA are, in turn, subject to judicial review only in the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292 (Supp. V 1993). The Federal Circuit's review of a COVA decision is limited to the question of "the validity of any statute or regulation * * * or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [COVA] in making the decision." 38 U.S.C. 7292(a) (Supp. V 1993). Except as necessary to decide "a constitutional issue," the Federal Circuit "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. 7292(d)(2) (Supp. V 1993).

The scheme prescribed in the VJRA for review of the Board's decisions by the COVA and the Federal Circuit is exclusive of other remedies. Except for such review, the Secretary's decision on a claim for veterans' disability benefits "may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. 511(a) (Supp. V 1993).[1]

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[1] Section 511 of Title 38 (38 U.S.C.) (Supp. V 1993) provides:

> (a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.
>
> (b) The second sentence of subsection (a) does not apply to —
>
> (1) matters subject to section 502 of this title;
>
> (2) matters covered by sections 1975 and 1984 of this title;
>
> (3) matters arising under chapter 37 of this title; and
>
> (4) matters covered by chapter 72 of this title.

The only exception in subsection (b) applicable to the Secretary's decisions concerning an individual veteran's disability benefits is in subsection (b)(4), which authorizes review under the VJRA (codified in part as Chapter 72 of Title 38). The other exceptions in subsection (b) are inapplicable here. Subsection (b)(1) provides for judicial review of regulations adopted by the Secretary. See 38 U.S.C. 502 (Supp. V 1993). Subsection (b)(2) concerns civil actions related to life insurance. See 38 U.S.C. 1975, 1984 (Supp. V 1993). Subsection (b)(3) relates to housing and small business loans. See 38 U.S.C. 3701 *et*

b. Petitioner served in the United States Navy as a mess cook on the *U.S.S. New Orleans* during the Persian Gulf War. Petitioner contends that during his service he was exposed to various pollutants, including smoke from oil fires, diesel-engine exhaust, and volcanic ash. After returning to the United States, he claims to have suffered health problems from that exposure. Two private physicians believed that petitioner had "chemical sensitivity" and should be put in an "environmental unit" to identify the chemicals causing his problems. A physician employed by the Department of Veterans Affairs, however, disagreed with that assessment. The Secretary has declined to provide petitioner with treatment in an environmental unit or with reimbursement for such treatment. Pet. App. 1-2, 13-14.

2. Petitioner filed the present action in the United States District Court for the Western District of Texas, naming the Secretary and three other VA officials as defendants. He claimed that the Secretary violated the Rehabilitation Act of 1973 and the Fifth Amendment by refusing him treatment in an environmental unit. He also asserted *Bivens* claims against the other respondents, contending that the refusal to treat him in an environmental unit unconstitutionally deprived him of his property interest in disability benefits. The Secretary moved to dismiss the action. Pet. App. 12-13.

The district court dismissed the action, holding that it lacked jurisdiction over petitioner's claims. Pet. App. 12-20. The court determined that "[t]he

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seq. (Supp. V 1993). See generally *Sugrue* v. *Derwinski*, 26 F.3d 8, 11 (2d Cir. 1994), cert. denied, 115 S. Ct. 2245 (1995).

detailed nature of the procedural and appellate structure contained within the Veterans' Judicial Review Act clearly indicate Congress' intent to confine decisions affecting veteran's benefits within this structure." *Id.* at 17. The court also determined that petitioner's challenge to the denial of disability benefits was "precisely" the type of challenge that Congress intended to be reviewed exclusively under the Act. *Id.* at 18.

3. The court of appeals affirmed. Pet. App. 1-11. It held, first, that the district court lacked subject-matter jurisdiction over petitioner's claim against the Secretary. The court observed that "the [VJRA] * * * clearly announced the intent of Congress to preclude review of benefits determinations in federal district courts." *Id.* at 5. The court further held that petitioner's *Bivens* claims were properly dismissed, because "[s]pecial factors counsel[ed] hesitation to create a *Bivens* remedy in this case." *Id.* at 11. The court identified those factors as the "elaborate remedial structure" created in the VJRA and the Act's "explicit[] preclu[sion] [of] judicial review of veterans' benefits disputes." *Ibid.*

ARGUMENT

1. The court of appeals correctly upheld the dismissal of petitioner's claim that the Secretary violated the Rehabilitation Act and the Fifth Amendment by refusing to provide or pay for treatment in an environmental unit. Pet. App. 3-8. Moreover, the court of appeals' decision does not conflict with the decision of any other court of appeals or raise any issue of general importance warranting this Court's review.

Section 511(a) of Title 38 provides that the Secretary "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. 511(a) (Supp. V 1993). Section 511(a) further provides that, with certain exceptions, the Secretary's decision on such a question is "final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." *Ibid.* The only exception arguably applicable here is prescribed in the VJRA, which provides for review in the COVA and the Federal Circuit of final decisions of the Secretary made by the Board of Veterans' Appeals. 38 U.S.C. 511(b)(4) (Supp. V 1993).

As both courts below correctly concluded, petitioner's claim falls squarely within the category of disputes covered by Section 511(a). Petitioner disagrees with the Secretary's determination that his disability does not require treatment in an environmental unit. That determination is a "decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. 511(a) (Supp. V 1993); see 38 U.S.C. 1710(a)(1)(D) (Supp. V 1993) (requiring Secretary to "furnish hospital care * * * *which the Secretary determines is needed* * * * to a veteran who has a service-connected disability rated at 50 percent or more") (emphasis added); see also 38 U.S.C. 1703(a) (Supp. V 1993) (authorizing Secretary to pay for services that cannot be provided by VA facilities). The Secretary's decision was therefore reviewable, if at all, only by the COVA and the Federal Circuit pursuant to the VJRA (see 38 U.S.C. 511(b)(4) (Supp. V 1993)), and not

"by any other official or by any court" (38 U.S.C. 511(a) (Supp. V 1993)), including the district court.[2]

In contending that Section 511(a) did not bar district court jurisdiction over his claim, petitioner relies primarily (Pet. 11-12) on *Traynor* v. *Turnage*, 485 U.S. 535 (1988). In *Traynor*, the Administrator of the Veterans' Administration (VA) refused to extend the time within which two veterans recovering from alcoholism could use their veterans' education benefits. 485 U.S. at 537. He based that refusal on a VA regulation defining alcoholism as "willful misconduct" that precluded such extensions of time. *Id.* at 538-539. The veterans brought actions against the Administrator in federal district court, claiming that

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[2] It is not clear whether the Board had authority to review the Secretary's decision refusing to provide or pay for petitioner to be treated in an environmental unit. The Board has authority to review the Secretary's decision regarding "eligibility for hospitalization, outpatient treatment," 38 C.F.R. 20.101(b), and reimbursement for unauthorized medical expenses, 38 C.F.R. 20.101(a)(15). The Board lacks authority, however, to review the Secretary's "determinations of the need for and appropriateness of specific types of medical care and treatment for an individual." 38 C.F.R. 20.101(b). The Secretary's decision in this case appears to fall into the latter category, but the matter is not free from doubt because petitioner did not seek Board review of that decision. If the Board indeed lacked jurisdiction to review the Secretary's decision, judicial review of the Secretary's decision would not be available under the VJRA, since the VJRA provides for judicial review (by the Federal Circuit, following review by the COVA) only of decisions by the Board. In any event, although it is not clear whether review of the Secretary's decision in the present case was available under the VJRA (see 38 U.S.C. 511(b)(4) (Supp. V 1993)), it *is* clear that review of that decision was *not* available in the district court, because the decision fell within Section 511(a).

the regulation violated the Rehabilitation Act. *Id.* at 539-540. The Administrator argued that judicial review of the Rehabilitation Act claim was precluded by a predecessor of Section 511(a), codified as 38 U.S.C. 211(a) (1982), which barred judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the [VA] providing benefits for veterans." *Traynor*, 485 U.S. at 539, 540-541.

This Court rejected the Administrator's argument, finding "no clear and convincing evidence of any congressional intent to preclude a suit claiming that § 504 of the Rehabilitation Act * * * has invalidated an otherwise valid regulation issued by the [VA]." *Traynor*, 485 U.S. at 543. The Court construed Section 211(a) to bar judicial review of challenges to the Administrator's interpretations of veterans' benefits laws, but not challenges based on laws that are not specifically related to veterans benefits, such as the Rehabilitation Act and the Constitution. 485 U.S. at 543-544.

As part of the VJRA, Congress amended Section 211(a) to respond to "*Traynor*-type cases." H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 21 (1988). As amended, Section 211(a)—now codified in substantially identical form as Section 511(a)—gave the Secretary exclusive jurisdiction to "decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans." VJRA § 101(a), 102 Stat. 4105. The House Report on the amendment explained that it would bar district court review of claims that the Secretary's denial of veterans benefits violated federal laws not specifically related to

veterans, such as the Rehabilitation Act and the Constitution. H.R. Rep. No. 963, *supra*, at 27, 30. The House Report also observed that such claims could only be reviewed, as relevant here, by the COVA and, thereafter, the Federal Circuit pursuant to the review scheme enacted as Title III of the VJRA (codified as Chapter 72 of Title 38). H.R. Rep. No. 963, *supra*, at 27.[3]

Since Section 211 was amended in 1988, the courts of appeals have consistently held that it bars district court review of claims similar to petitioner's. For example, *Larrabee* v. *Derwinski*, 968 F.2d 1497 (2d Cir. 1992), involved a substantive and procedural due process challenge to the Secretary's determination of the appropriate treatment for a veteran's medical condition. *Id.* at 1498. The Second Circuit held that Section 511(a) barred district court jurisdiction over the claim; such a claim had to "be pursued within the appellate mill Congress established in the VJRA." 968 F.2d at 1501. See also, *e.g.*, *Sugrue* v. *Derwinski*, 26 F.3d 8, 10-11 (2d Cir. 1994), cert. denied, 115 S. Ct. 2245 (1995); *Hicks* v. *Veterans Admin.*, 961 F.2d 1367, 1368-1369 (8th Cir. 1992).[4]

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[3] Petitioner errs in contending (Pet. 16-18) that the House Report cited in the text is not authoritative, in light of a later "Compromise Agreement" between the House and the Senate. The Explanatory Statement on the Compromise Agreement makes clear that the Senate accepted the House provision amending Section 211(a). The only change made to the House provision by the Compromise Agreement was a minor change in wording. Compare H.R. Rep. No. 963, *supra*, at 54 (reproducing Section 211, as amended by House bill) with 102 Stat. 4105 (final version of amended Section 211).

[4] Petitioner's reliance (Pet. 13-14, 24) on *Marozsan* v. *United States*, 852 F.2d 1469 (7th Cir. 1988) (en banc), is

2. Petitioner also challenges (Pet. 25-26) the dismissal of his *Bivens* claims against respondents other than the Secretary. The court of appeals correctly held that *Bivens* does not create a cause of action based on an individual dispute about veterans' benefits. Pet. App. 9-11. The recognition of a *Bivens* remedy would be inconsistent with the elaborate system for review of such disputes established by the VJRA. Compare *Schweiker* v. *Chilicky*, 487 U.S. 412, 427-428 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). The court of appeals' holding on the *Bivens* issue accords with the only other court of appeals decision to address the issue. See *Sugrue*, 26 F.3d at 12-13.

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misplaced. *Marozsan* construed the version of Section 511(a) (then Section 211(a)) in effect prior to its 1988 amendment, and, relying on *Traynor*, held that the district court had jurisdiction to review a veteran's challenge to the constitutionality of the VA's procedure for addressing benefit claims. See 852 F.2d at 1473 n.11, 1475-1476; see also *id.* at 1481 (Posner, J., concurring) (*Traynor* "seems dispositive"). In light of the 1988 amendments to Section 211(a), *Marozsan* is inapposite here for the same reason as is *Traynor*. Moreover, even before the 1988 amendments, other federal courts consistently held that the predecessor of Section 511(a) barred district court jurisdiction over disputes involving individual veterans benefit decisions. See, *e.g.*, *Higgins* v. *Kelley*, 824 F.2d 690, 691 (8th Cir. 1987); *In re "Agent Orange" Prod. Liability Litigation*, 818 F.2d 194, 201 n.2 (2d Cir. 1987); *Anderson* v. *Veterans Admin.*, 559 F.2d 935, 936 (5th Cir. 1977); *Ryan* v. *Cleland*, 531 F. Supp. 724, 730-731 (E.D.N.Y. 1982). Petitioner's claim relates to an individual benefits decision, rather than the procedures by which such decisions are made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
MARK C. NILES
Attorneys

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